No. _____

87-1993

In The

Supreme Court Of The United States

Supreme Court, U.S.
FILED
MAY 19 1988
JOSEPH F. SPANIOL, JR.

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

_____ TERM, 1988

ANTHONY H. ROBINSON,

Petitioner,

v.

VIRGINIA STATE BAR, ex rel
THIRD DISTRICT COMMITTEE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

Craig S. Cooley, Esquire
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(804) 358-2328

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LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

QUESTIONS PRESENTED

I. WHETHER THE DISMISSAL OF ROBINSON'S APPEAL WAS AN ACTION UNDER COLOR OF LAW OR AUTHORITY WHICH VIOLATED ROBINSON'S CONSTITUTIONAL RIGHT TO EQUAL PROTECTION OF THE LAWS?

II. WHETHER THE DISMISSAL OF ROBINSON'S APPEAL WAS AN ABUSE OF JUDICIAL DISCRETION IN VIOLATION OF LEGISLATIVE INTENT AND IN VIOLATION OF ROBINSON'S CONSTITUTIONAL RIGHT TO EQUAL PROTECTION OF THE LAWS?

III. WHETHER THE REFUSAL TO VACATE OR RECONSIDER THE DECISION TO DISMISS ROBINSON'S APPEAL WAS AN ABUSE OF DISCRETION CONTRARY TO FEDERAL PRECEDENTS?

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OPINIONS BELOW

The opionion of the Supreme Court of Virginia is unreported and is printed in Appendix A hereto, infra, page 18. The judgment of the Supreme court of Virginia refusing to vacate its order dismissing Robinson's appeal is printed in Appendix A hereto, infra, page 25.

JURISDICTION

The judgment of the Supreme Court of Virginia (Appendix A, infra, page 16) was entered on February 19, 1988. A motion to vacate said order (treated as a petition for rehearing) was denied on April 13, 1988. (Appendix A, infra, page 25) The jurisdiction of the Supreme Court is invoked under Title 28, United States Code, Section 1257(3).

QUESTIONS PRESENTED

I. WHETHER THE DISMISSAL OF ROBINSON'S APPEAL WAS AN ACTION UNDER COLOR OF LAW OR AUTHORITY WHICH VIOLATED ROBINSON'S CONSTITUTIONAL RIGHT TO EQUAL PROTECTION OF THE LAWS?

II. WHETHER THE DISMISSAL OF ROBINSON'S APPEAL WAS AN ABUSE OF JUDICIAL DISCRETION IN VIOLATION OF LEGISLATIVE INTENT AND IN VIOLATION OF ROBINSON'S CONSTITUTIONAL RIGHT TO EQUAL PROTECTION OF THE LAWS?

III. WHETHER THE REFUSAL TO VACATE OR RECONSIDER THE DECISION TO DISMISS ROBINSON'S APPEAL WAS AN ABUSE OF DISCRETION CONTRARY TO FEDERAL PRECEDENTS?

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

> (5) Appeal. The person or persons making the complaint or the defendant, may, as of right, appeal from

> the judgment of the court to the Supreme Court, by petition based upon a true transcript of the record, which shall be made up and certified as in actions at law. in all such cases where a defendant's license to practice law has been revoked by the judgment of the court, his privilege to practice law shall be suspended pending appeal. [emphasis added]

Code of Virginia (1950), as amended, Section 54-74, subparagraph 5. Printed in Appendix B hereto, infra, page ___.

> All persons born or naturalized in the United States, and subject of the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws. [emphasis added].

United States Constitution, Fourteenth Amendment, Section 1.

STATEMENT OF CASE

Robinson is aggreieved by the final

order of the Supreme Court of Virginia ("Virginia Supreme Court") dismissing his appeal. Appendix A, infra. page ___ Robinson's appeal was dismissed because a "written" notice of appeal was not timely filed by counsel representing Robinson. Id.; Rule 9, Rules of the Supreme Court of Virginia.

On September 28, 1987, a hearing was conducted, in the Richmond Circuit Court, before a three-judge panel which heard charges of misconduct against Robinson. Said charges of misconduct alleged that Robinson violated Diciplinary Rules 5-105 (A), (B) and (C) of the Revised Virginia Code of Professional Responsiblity. The three-judge panel, after hearing evidence, ore tenus, found Robinson guilty of misconduct constituting a violation of the aforementioned disciplinary rules and, upon the recommendation of the complainant (appellee herein; hereinafter "the Bar"),

ordered, inter alia, that Robinson's license to practice law within the Commonwealth of Virginia be suspended for a period of twelve (12) months, effective Dec. 1, 1987. At all times during the aforementioned proceedings Robinson was represented by retained counsel.

After the aforementioned proceedings were concluded, Robinson informed all concerned of his intentions to exercise his statutory right of appeal. See Section 54-74(5), Code of Virginia ("Va. Code"), 1950, as amended. Specifically, Robinson confered with his retained counsel and directed him to pursue such appeal on Robinson's behalf.

Counsel for Robinson noted Robinson's intention to appeal the order of October 21, 1987 to the Virginia Supreme Court, obtained an order suspending enforcement of said order pending proceedings on appeal to the Virginia Supreme Court, and timely

filed a petition for appeal with the Virginia Supreme Court. Unfortunately, as aforestated, by order entered February 19, 1988, the Virginia Supreme Court dismissed Robinson's appeal. Appendix A, infra, page ___.

REASONS FOR GRANTING WRIT

I. Whether The Dismissal Of Robinson's Appeal Was An Action Under Color Of Law Or Authority Which Violated Robinson's Constitutional Right To Equal Protection Of The Laws?

The Virginia Supreme Court, allegedly acting pursuant to Rule 5:9 of the Rules of the Supreme Court of Virginia, dismissed Robinson's appeal, as a matter of right, contrary to the intentions of the Virginia legislature.

> . . . the defendant, may, as of right, appeal from the judgment of the court to the Supreme Court, by petition based upon a true transcript of the record, * * * * * . . . [emphasis added]

Code of Virginia, 1950, Section 54-74(5). As the Virginia Supreme Court has recognized, the Virginia legislature intended for Robinson's case to be reviewed on appeal, de novo. Blue v. Seventh District Committee of the Virginia State Bar, 220 Va. 1056, 265 S.E. 2d 753 (1980).

> Claims of entitlement, and hence property interests, arise from many sources. State statutes, [such as Code of Virginia, 1950, Section 54-74 (5)] . . . which secure certain benefits, may be sufficient to support claims of entitlement to those benefits. [emphasis added; citatious omitted]

Hutto v. Waters, 552 F. Supp. 266, 269 (E. D. Va. 1982). The Virginia legislature conferred upon Robinson an appeal from the judgment of the three-judge panel, "as of right". Robinson (the defendant; petitioner herein), aggreieved by the judgment of the three-judge panel, was entitled to appeal to the Virginia Supreme Court from said judgment "as of right". Therefore, the Virginia Supreme Court, acting under

color of law or authority (Rule 5:9 of the Rules of the Supreme Court of Virginia), arbitrarily dismissed Robinson's appeal in violation of Robinson's statutory right. Robinson has been denied the equal protection of the laws, specifically as provided for under the provisions of Code of Virginia (1950), Section 54-74(5).

II. Whether The Dismissal Of Robinson's Appeal Was An Abuse Of Judicial Discretion In Violation Of Legislative Intent And In Violation Of Robinson's Constitutional Rignt To Equal Protection Of The Laws?

The Supreme Court of Virginia has clearly stated the purpose of Rule 5:9 of the Rules of the Supreme Court of Virginia.

> Purpose of the specific time limit is not to penalize the appellant but to protect the appellee. If the required papers are not filed within the time limit, the appellee is entitled to assume that the litigation is ended, and to act on that assumption. Litigation is a serious and harassing matter, and the right to know when it

> is ended is a valuable right. [emphasis added]

Avery v. County School Board, 192 Va. 329, 64 S.E. 2d 767 (1951). In light of the clear wording of Rule 5:9(a), Rules of the Supreme Court of Virginia:

> No appeal shall be allowed unless, within 30 days after entry of final judgment or other appealable order or decree, counsel[1] for the appellant files with the clerk of the trial court a notice of appeal and at the same time mails or delivers a copy of such notice to all opposing counsel. [emphasis added]

the Virginia Supreme Court apparently has forgotten or elected to ignore the Avery decision. Robinson, at all times, has been "represented by an attorney". Robinson's actions unquestionably evidenced his intentions to exercise his statutory right to have the Virginia Supreme Court review

---

[1] Rule 5:1(5) Rules of the Supreme Court of Virginia, defines "counsel for the appellant" as "one of the attorneys representing each appellant represented by an attorney and each appellant not represented by an attorney".

the evidence, de novo, presented against him and make an independent judgment. Blue v. Seventh District Committee of the Virginia State Bar, supra. It was counsel for Robinson, not Robinson, who failed to timely file the "written" notice of appeal. Allegedly exercising sound judicial discretion, the Virginia Supreme Court relied upon Rule 5:9(a) as the basis for dismissing Robinson's appeal. In light of Reizakis v. Loy, 490 F. 2d 1132, 1135 (4th Cir. 1974)

> . . . dismissal "must be tempered by a careful exercise of judicial discretion". * * * Rightfully, courts are reluctant to punish client for the behavior of his lawyer. [quotation in original; citation omitted]

the Virginia Supreme Court did not exercise sound judicial discretion. Judicial discretion was exercised abusively in violation of Robinson's constitutional right to equal protection of the laws.

III. Whether The Refusal To Vacate Or Reconsider The Decision To Dismiss Robinson's Appeal Was An Abuse Of Judicial Discretion Contrary To Federal Precedents?

Consistently, the federal courts have expressed that a client should not be punishised (penalized) for the negligence of his attorney. Blois v. Friday, 612 F. 2d 938 (5th Cir. 1980); Reizakis v. Loy, 409 F. 2d 1132 (4th Cir. 1974). The Virginia Supreme Court is, unquestionably, aware that, at all times, Robinson was represented by counsel. As set forth to the Virginia Supreme Court by Robinson's new counsel, the failure to timely file the "written" notice of appeal was due to the negligence of counsel formerly representing Robinson. The inaction of Robinson's former counsel should not be utilized to punish (penalize) Robinson. Blois v. Friday, supra; Reizakis v. Loy, supra.

Contrary to federal precedents,

Robinson is suffering punishment (a penalty) because of the inaction of his former counsel. This punishment is being inflicted upon Robinson by an abuse of judicial discretion. That is, the Virginia Supreme Court is aware that Robinson had the right to expect that his attorney would competently and diligently represent his interests; that his attorney knew or would learn what was required to effectively present an appeal to the Virginia Supreme Court on Robinson's behalf; that his attorney would do what was necessary to cause Robinson's appeal to be properly presented (including the requisite giving of notice to all parties in interest) to the Virginia Supreme Court. The Virginia Supreme Court knew of the federal courts view that

> . . . dismissal "must be tempered by a careful exercise of judicial discretion". * * * Rightfully, courts are reluctant to punish a client for behavior of his lawyer. [quotation in

original; citations omitted; emphasis added]

Reizakis v. Loy, supra; Blois v. Friday, supra. Careful judicial discretion was not exercised by the Virginia Supreme Court. The Virginia Supreme Court expressed no reluctance in penalizing Robinson for his attorney's inactions. Had the Virginia Supreme Court been reluctant in inflicting punishment (by reviewing Robinson's motion to vacate order (treated as a motion for rehearing) upon its merits) it would have determined that "good cause"[2] existed and that the ends of justice would be attained by granting Robinson an extention of time[3]. Dismissal

---

[2]See Hartscock v. Powell, 199 Va. 320, 99 S.E. 2d 581 (1957). An extention of 30 days was granted for the filing of the notice of appeal upon a showing of good cause. The court took jurisdiction to decide the case on its merits.

[3]The "written" notice of appeal was filed by Robinson's counsel approximately 4 days late. However, the petition for appeal was timely filed.

of Robinson's appeal and the denial of motion to vacate order (treated as a motion to rehear) were clear abuses of judicial discretion, contrary to federal precedents, requiring this Court to exercise its certiorari jurisdiction.

State court attorney diciplinary actions have previously been reviewed by this Court where questions arose concerning violations of constitutional rights.

> For a State may not, under the guise prohibiting professional misconduct, ignore constitutional rights. [citations omitted] * * * "In the domain of these indispensable liberties, whether of speech, press, or association, [or due process or equal protection,] the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action". * * * "[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling". * * * " * * * <u>regulatory measures</u> * * * no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights [nor the prohibitions or protections mandated under

the Fourteenth Amendment]". [bracketed phrases added] NAACP v. Button, 371 U.S. 415, 439, 83 S. Ct. 328, 341 (1963). See also Re Buffalo, 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968); Theard v. United States, 354 U.S. 155, 77 S.Ct. 1274 __ L. Ed. __ (1957). In Avery v. County School Board, supra, the Virginia Supreme Court clearly stated that the purpose of Rule 5:9, Rules of Supreme Court of Virginia, is regulatory, to protect the appellee and "not to penalize the appellant". It is, therefore, inconceivable why the Virginia Supreme Court, contrary to federal precedents (Blois v. Friday, supra; Reizakis v. Loy, supra) and contrary to Robinson's constitutional right to equal protection of the laws, has elected to penalized Robinson for the inadvertence of his attorney. The Virginia Supreme Court, unquestionably, abused its judical discretion in violation of

Robinson's constitutional rights.

CONCLUSION

The jurisdiction (28 U. S. C. Section 1257(3)) of this Court is properly invoked. This petition presents important and novel substantial federal questions requiring plenary consideration, with briefs on the merits and oral argument, for their resolution, to wit:

> Whether the Virginia Supreme Court employed a regulatory measure (Rule 5:9, Rules of Supreme Court of Virginia) for the purpose of, or with the effect of, stifling or penalizing Robinson in violation of the prohibitions of or in violation of the Rights protected by the Fourteenth Amendment?

The undeniable answer is in the affirmative. The writ of certiorari prayed for should issue forth.

Dated 19th of May, 1988.

ANTHONY H. ROBINSON

By _____
Counsel

RECORD NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

_____ TERM, 1988

_____

ANTHONY H. ROBINSON, Petitioner,

v.

VIRGINIA STATE BAR, ex rel
Third District Committee, Respondent.

_____

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

_____

Appendix A

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND ON WEDNESDAY THE 19th DAY OF FEBRUARY, 1988.

ANTHONY H. ROBINSON, Appellant,

against Record No. 880078
Circuit Court No. 87-2540

VIRGINIA STATE BAR, ex rel.
Third district Committee, Appellee.

Finding that the appeal was not perfected in the manner provided by law, the Court dismisses the petition for appeal filed the above-styled case. Rule 5:9.

A Copy,

Teste:

/s/ David B. Beech

Clerk

IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

ANTHONY H. ROBINSON,

Appellant,

v. 880078

VIRGINIA STATE BAR, ex rel,
Third District Committee,

Appellee.

MOTION TO VACATE
ORDER DISMISSING APPEAL
AND MEMORANDUM IN
SUPPORT THEREOF

Motion To Vacate
Order Dismissing Appeal

The appellant, by counsel, moves this Court to vacate its order of February 19, 1988 and to enter an order setting this case upon the docket for oral argument in accord with the statuatory right of appeal guaranteed to appellant under the provisions of Section 54-74(5) of the Code of

Virginia ("the Code"), 1950, as amended, or in the alternative, an order granting appellant a rehearing. The grounds for this motion are: that considering the record, the statutes and the precedents, the decision of this Court to dismiss appellants's appeal is plainly wrong. In support hereof appellant states:

1. That Section 54-74(5) of the code guarantees appellant an appeal to this Court as a matter of right.

2. That contrary to this Court's misunderstanding, appellant, at all times during the pendency of the investigation by the Bar and during the pendency of the proceedings below, by his actions, made it unquestionably clear that he would exercise his statutory right to appeal any adverse decision to this Court. Thus, the fact that the "written" notice of appeal may not have been filed within the required 30 day period is of no consequence as

appellant made known his intention to exercise his statutory right of appeal even prior to the commencement of the proceedings before the trial court. See Lackey v. Lackey, 222 Va. 49, 278 S.E. 2d 811 (1981).

3. That the "written" notice of appeal was not untimely filed as appellant and his former counsel verily believed that the trial court would timely, in accord with the provision of Rule 1:1 of the Rules of the Supreme Court of Virginia ("the Rules"), exercise its authority to modify the order entered October 21, 1987.

4. That the "written" notice of appeal was not untimely filed as it was filed on November 25, 1987, approximately two (2) months prior to the filing of the trial court's "final order" modifying the order of October 21, 1987.

5. That, if this Court finds that the "written" notice of appeal was untime-

ly filed, the untimely filing of said "written" notice was the error of appellant's former counsel and such error must not be visited upon appellant. Blois v. Friday, 612 F. 2d 938 (5th Cir. 1980); Reizakis v Loy, 490 F. 2d 1132 (4th Cir. 1974).

WHEREFORE, appellant prays that the February 19, 1988 order of this Court dismissing his appeal be vacated; that this cause be placed upon the docket for oral argument, or, in the alternative, that he be granted a rehearing.

Memorandum

This matter is before this Court pursuant to Section 54-74(5) of the Code which specifically guarnatees appellant an appeal to this Court "as of right". Rutledge v. Tenth District Committee of Virginia State Bar, 214 Va. 312, 200 S.E.

2d 573 (1973) DeFoe v. Friedlander, 211 Va. 121, 176 S.E. 2d 448 (1970); Maddy v. First District Committee of the Virginia State Bar, 205 Va. 652, 139 S.E. 2d 56 (1964), rehearing denied. By order of this Court entered February 19, 1988 this appeal was inadvertently dismissed.

Section 54-74(5) specifically guarantees Robinson "as of right" [an] appeal from the judgment of the court [below] to [this Court]". Rutledge v. Tenth District Committee of Virginia State Bar, supra; DeFoe v. Friedland, supra; Maddy v. First District committee of the Virginia State Bar, supra. To deny Robinson his statutory right of appeal, upon the pretext that his intent to exercise said right was untimely noted, is unquestionably tantamount to violating Robinson's constitutional rights as guaranteed under the proscriptive mandates of the Fourteenth Amendment to the United States constitu-

tion

> * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of . . . liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Specifically, to deny Robinson the right of appeal statutorily guaranteed to him is to deny Robinson his constitutional right to "the equal protection of laws".

First of all, as similarly noticed by this Court in Lackey v. Lackey, supra, Robinson's actions unquestionably evidenced his intent to exercise his right of appeal to this Court from any adverse decision rendered by the trial court. See affidavit attached as exhibit "A". Robinson timely noted his appeal.

Further, assuming arguendo, the "written" notice of appeal was untimely filed, it was untimely filed by Robinson's former counsel. The untimely filing was

the error of Robinson's former counsel. In Blois v. Friday, supra, a default summary judgment was entered against the plaintiff because plaintiff's attorney, due to inadvertence, failed to answer the defendant's motion for summary judgment. Considering the facts, the Court ruled

> The plaintiff should not be punished for his attorney's mistake absent a clear record of delay, willful contempt or contumacious conduct. [citations omitted]

612 F. 2d at 940. This Court must further bear in mind the opinion expressed in Reizakis v. Loy, supra,

> . . . dismissal "must be tempered by a careful exercise of judicial discretion". * * * Rightfully, courts are reluctant to punish a client for the behavior of his lawyer. [citation omitted]

409 F. 2d at 1135. Though Blois and Reizakis were not addressing dismissed appeals, both cases addressed the issue of concern in the instant case: A CLIENT MUST NOT BE PUNISHED FOR ACTIONS OR INAC-

TIONS OF HIS ATTORNEY.

However, if Robinson's former counsel untimely filed the notice of appeal, this error was apparently caused by the trial court's failure to act in a timely manner. That is, the motion for the trial court to modify its order of October 21, 1987 was made within the twenty-one (21) day period within which the trial court could have entered its order granting Robinson a stay of the execution of the order suspending his license effective December 1, 1987. As evidenced by the record, the trial court (obviously believing it still had jurisdiction) entered its order staying (modifying) its order of October 21, 1987 on January 20, 1988. Thus it would appear that Robinson's former counsel timely filed the "written" notice of appeal almost two months before the final order was entered by the trial court.

Nevertheless, the fact remains, that

Robinson is entitled to a statutory right of appeal to this Court from the judgment of the trial court. Section 54-74(5) of the code; Rutledge v. Tenth District Committee of Virginia State Bar, supra; Maddy v. First District Committee of the Virginia State Bar, supra. This Court must, therefore, vacate its order of February 19, 1988.

ANTHONY H. ROBINSON

By /s/ Bradford F. Johnson

Bradford F. Johnson, Esquire
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Craig S. Cooley, Esquire
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Richmond, Virginia 23220
(804) 358-2328

CERTIFICATE

A true copy of the foregoing MOTION

TO VACATE ORDER DISMISSING APPEAL AND MEMORADUM was mailed, postage prepaid,/ HAND DELIVERED to Harry M. Hirsch, Esquire, Assistant Bar Counsel 405 Strawberry Street, Richmond, Virginia 23220, on this 18th day of March, 1988.

/s/ Bradford F. Johnson

IN ACCORD WITH THE PROVISIONS OF RULE 5:4 (a) OF THE SUPREME COURT OF VIRGINIA, APPELLANT REQUEST THAT HE BE GRANTED LEAVE TO ORALLY ARGUE THIS MOTION BEFORE. JUSTICE OR A PANEL OF JUSTICES. IMMEDIATE RELIEF IS NECESSARY TO ATTAIN THE ENDS OF JUSTICE AND FOR THE PURPOSE OF PREVENTING APPELLANT FROM ILLEGAL AND UNJUSTIFIED IRREPARABLE HARM.

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND ON WEDNESDAY THE 13th DAY OF APRIL, 1988.

Anthony H. Robinson, Appellant,

against Record No. 880078
Circuit Court No. 87-2540

Virginia State Bar, ex rel.
Third District Committee, Appellee.

Upon A Petition For Rehearing

On consideration of the motion of the appellant to vacate order dismissing appeal, which is treated as a petition to set aside the judgment rendered herein on the 19th day of February, 1988 and grant a rehearing thereof, memorandum in support thereof, the appellee's reply and memorandum in support thereof, the prayer of the

said petition is denied.

A Copy,

Teste:

/s/ David B. Beech

Clerk

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND ON WEDNESDAY THE 13th DAY OF APRIL, 1988.

Anthony H. Robinson, Appellant,

against Record No. 880078
Circuit Court No. 87-2540

Virginia State Bar, ex rel.
Third District Committee, Appellee.

ORDER STAYING EXECUTION OF JUDGMENT

Upon consideration of the petition of the appellant, by counsel, for a writ of supersedeas, it is ordered that the execution and enforcement of the judgment rendered herein February 19, 1988 be and the same hereby is stayed, to and including the 19th day of May, 1988, on the expiration of which time the same may be enforced, unless the case has been before that time docketed in the Supreme Court of

the United States, in which event enforcement thereof shall be stayed until the final determination of the case by that Court.

A Copy,

Teste:

/s/ David B. Beech

Clerk

IN THE SUPREME CORUT OF VIRGINIA
AT RICHMOND

RECORD NO. 880078

ANTHONY H. ROBINSON, Appellant,

v.

VIRGINIA STATE BAR, el rel
Third District Committee, Appellee.

NOTICE OF PETITION FOR
WRIT OF CERTIORARI

Notice Is Hereby Served, that the Appellant herein is aggrieved by this Court's final decision, as entered April 13, 1988, denying his petition for rehearing/reconsideration as presented by way of a motion to vacate final order. Therefore, Appellant shall file in the Supreme Court of the United States a petition for writ of certiorari pursuant to Title 28, United States Code, Section 1257, subparagraph 3. A writ of

supersedeas is re-

quested.

ANTHONY H. ROBINSON

By /s/ Craig S. Cooley

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3000 Idlewood Avenue
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IN THE
SUPREME COURT OF VIRGINIA

ANTHONY H. ROBINSON,

Appellant,

v. RECORD NO. 880078

VIRGINIA STATE Bar, ex rel,
Third District Committee,

Appellee.

NOTICE OF PETITION FOR WRIT
OF CERTIORARI

Notice is hereby given that, Anthony H. Robinson, the appellant above named, hereby intends to make petition to the Supreme Court of the United States for petition for writ of certiorari from the final order of this Court dismissing his appeal, entered in this action of February 19, 1988.

Petition for writ of certiorari shall be sought pursuant to Title 28, United States Code, Section 1257, subparagraph 3.

Dated _____.

ANTHONY H. ROBINSON

By /s/ Bradford F. Johnson

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321 North 23rd Street
P. O. Box 8047
Richmond, Virginia

Craig S. Cooley, Esquire
3000 Idlewood Avenue
Richmond, Virginia 23220

RECORD NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

_____ TERM, 1988

_____

ANTHONY H. ROBINSON, Petitioner,

v.

VIRGINIA STATE BAR, ex rel
Third District Committee, Respondent.

_____

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

_____

Appendix B

PUBLISHER'S NOTE

THE FOLLOWING PAGE IS UNAVAILABLE FOR FILMING

38

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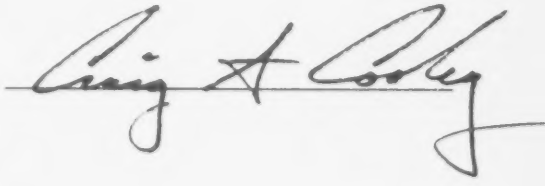
CERTIFICATE

A true copy of the foregoing PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA was mailed, postage prepaid, to Martha Parrish, Equire, Assistant Attorney General for the Commonwealth of Virginia, 101 North 8th Street, Richmond, Virginia, on this 19th day of May, 1988



No. 87-1993

Supreme Court, U.S.
FILED
MAY 19 1988
JOSEPH F. SPANIOL, JR.

In The Supreme Court Of The United States

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SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

ANTHONY H. ROBINSON,

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VIRGINIA STATE BAR, ex rel
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PETITION FOR WRIT OF CERTIORARI
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Supplemental Appendix B

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Counsel for Petitioner

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

Article 6

Revocation or Suspension of Licenses; Disbarment Proceedings.

§54-74. Procedure for suspension or revocation of license. (1) Issuance of rule. -- If the Supreme Court or the Court of Appeals, or any circuit court of this Commonwealth, observes, or if complaint, verified by affidavit, is made by any person to such court of any malpractice or of any unlawful dishonest, unworthy, corrupt or unprofessional conduct on the part of any attorney, or that any person practicing law is not duly licensed to practice in this Commonwealth, such court shall if it deems the case a proper one for such action, issue a rule against such attorney or other person to show cause why his license to practice law shall not be revoked or suspended. If the complaint, verified by affidavit, is made by a District Committee of the Virginia State Bar, such court shall issue a rule against such attorney to show cause why his license to practice law shall not be revoked or suspended.

(2) Judges hearing case. -- At the time such rule is issued the court issuing the same shall certify the fact of such issuance and the time and place of the hearing thereon, to the Chief Justice of the Supreme Court, who shall designate three judges of circuit courts of any circuit other than the circuit in which the case is pending to hear and decide the case.

(3) [Repealed.]

(3a) Prosecution -- Bar Counsel of the Virginia State Bar shall appear at the hearing and prosecute the case. Special counsel may be appointed to prosecute the case pursuant to § 2.1-122 of the Code of Virginia.

(4) Action of court. -- Upon the hearing, if the defendant is found guilty by the court his license to practice law in this Commonwealth shall be revoked, or suspended for such time as the court may prescribe. However, the court, in lieu of revocation or suspension, may, in its discretion, reprimand such attorney.

(5) Appeal. -- The person or persons making the complaint or the defendant, may, as of right, appeal from the judgment of the court to the Supreme Court, by petition based upon a true transcript of the record, which shall be made up and certified as in actions at law. In all such cases where a defendant's license to practice law has been revoked by the judgment of the court, his privilege to practice law shall be suspended pending appeal.

(6) "Any malpractice, or any unlawful, dishonest, unworthy, corrupt or unprofessional conduct," as used in this section, shall be construed to include (i) the improper solicitation of any legal or professional business or employment, either directly or indirectly; (ii) the acceptance of employment, retainer, compensation or costs from any person, partnership, corporation, organization or association with knowledge that such person,

partnership, corporation, organization or association has violated any provision of Article 7 (§ 54-78 et seq.) of this chapter; or (iii) the failure, without sufficient cause, within a reasonable time after demand, of any attorney-at-law to pay over and deliver to the person entitled thereto any money, security or other property which has come into his hands as such attorney. However, nothing contained in this article shall be construed to prohibit in any way any attorney from accepting employment to defend any person, partnership, corporation, organization or association accused or violating the provisions of Article 7 of this chapter.

(7) Representation by counsel. -- In any proceedings to revoke or suspend the license of an attorney under this or the preceding section (§ 54-73) the defendant shall be entitled to representation by counsel. Code of Virginia, 1950, as amended.

VIRGINIA:

IN THE CIRCUIT COURT OF THE
CITY OF RICHMOND
October 21, 1987

VIRGINIA STATE BAR EX REL
THIRD DISTRICT COMMITTEE, Complainant

v. CASE NO. LL1493

ANTHONY H. ROBINSON, Respondent.

ORDER

On September 28, 1987, came on for hearing the Charges of Misconduct certified against Anthony H. Robinson by the Third District Committee of the Virginia State Bar. The hearing was held before the designated panel of three Circuit Court Judges consisting of the Honorable Ligon L. Jones, the Honorable Edward P. Simpkins, Jr. and the Honorable Russell M. Carneal,

presiding as Chief Judge Designate. Notice of the Charges of Misconduct and of the hearing before the Virginia State Bar Disciplinary Board were served upon Anthony H. Robinson in the manner provided by the Rules applicable to this proceeding.

Anthony Robinson appeared in person at the proceeding. Counsel for the Respondent was D. Brock Matthews. Harry M. Hirsch, Assistant Bar Counsel, appeared for the Complainant.

Upon consideration of the testimony and documentary exhibits presented, the Court finds by clear and convincing evidence that:

1. Anthony H. Robinson, the respondent, is an attorney and was licensed to practice in Virginia during all times relative to these proceedings.

2. Respondent undertook representation of Lisa Stokes, a driver of an automobile in a personal injury case and also undertook representation of Cynthia Washington, a passenger in the same vehicle who was injured at the same time.

3. Respondent entered a nolo contendere plea in the traffic matter for Lisa Stokes, the driver of the vehicle, it being determined that the liability for said accident was lodge with the driver of the automobile.

4. Counsel for the insurance company, Christopher C. Spencer, informed respondent of the apparent conflict of interest in representing both the driver and the passenger of the vehicle wherein the driver of the said vehicle was at fault.

5. Respondent refused to acknowledge said conflict and continued representing both parties in the matter.

6. Counsel for the insurance company filed a petition in the General District Court for the City of Richmond, Civil Division, to have respondent removed from the case. Respondent finally acquiesced and withdrew from the matters hereinabove referred.

It is the opinion of the Court that such conduct by Anthony H. Robinson constitutes Misconduct in violation of Disciplinary Rules 5-105(A), 5-105(B) and 5-105(C) of the Revised Virginia Code of Professional Responsibility effective October 1, 1983.

Accordingly, it is ORDERED that the license of Anthony H. Robinson to practice law within the Commonwealth of Virginia, be suspended for a period of twelve (12) months, effective December 1, 1987.

It is further ORDERED that Anthony H. Robinson immediately give notice, by certified mail, of the suspension of his license to practice law in Virginia to all clients for whom he is currently handling matters and to all opposing

attorneys and to the presiding judges in pending litigation, and he shall further make immediate appropriate arrangements for the disposition of those matters presently in his care in conformity with the wishes of his clients, all pursuant to the Rules of the Supreme Court of Virginia, Part Six, Section IV, Paragraph 13(J)(1).

It is further ORDERED that Anthony H. Robinson shall furnish evidence of his compliance hereto to the Virginia State Bar within thirty days from the date of this Order.

It is further ORDERED that an attested copy of this Order shall be mailed by certified mail, return receipt requested to Anthony H. Robinson at his last address of record with the Virginia

State Bar, 321 North 23rd Street, Richmond, Virginia 23223 and to D. Brock Matthews, counsel for Respondent, at 2403 East Grace Street, Richmond, Virginia.

ENTER THIS ORDER THIS 21 DAY OF OCTOBER, 1987.

By /s/Russell M. Carneal

By /s/Ligon L. Jones

By /s/Edward P. Simpkins, Jr.

SEEN:

/s/ Harry M. Hirsch
Assistant Bar Counsel

/s/ D. Brock Matthews
Counsel for the Respondent

/s/ Anthony H. Robinson
Respondent

VIRGINIA:

CIRCUIT COURT OF THE CITY OF RICHMOND
John Marshall Courts Building
January 20, 1988

VIRGINIA STATE BAR, Ex Rel,
Third District Committee, Complainant,

v.

ANTHONY H. ROBINSON, Respondent.

ORDER

THIS DAY CAME the respondent, Anthony Robinson, by counsel, upon respondent's Motion To Stay Execution of the Order of Suspension of October 21, 1987, in the above-captioned case pending appeal.

UPON CONSIDERATION WHEREOF, the Court being of the opinion that respondent's Motion should be granted, it is ORDERED that execution of the Order of Suspension of October 21, 1987, be stayed pending appeal.

It is further ORDERED that a copy of this Order be sent to counsel for the complainant and a copy be sent to the Virginia State Bar.

A Copy,

Teste:

/s/ Iva R. Purdy

Clerk

I ask for this:

D. Brock Matthews, Esquire
P. O. Box 35635
2301 Hicks Road
Richmond, Virginia 23235
(804) 276,4491

CERTIFICATE

Three copies of the foregoing Supplemental Appendix to Petition for Writ of Certiorari to the Supreme Court of Virginia were mailed, postage pre-paid, to Martha Parrish, Esquire, Assistant Attorney General for the Commonwealth of Virginia, 100 North 8th Street, Richmond, Virginia, on this 3rd day of June, 1988.

Supreme Court, U.S.
FILED
JUN 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1993

In The

Supreme Court of the United States

October Term, 1988

ANTHONY H. ROBINSON,

Petitioner,

v.

VIRGINIA STATE BAR, *ex rel.*
THIRD DISTRICT COMMITTEE,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

MARY SUE TERRY
Attorney General of Virginia

GAIL STARLING MARSHALL
Deputy Attorney General
Counsel of Record

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QUESTION PRESENTED

Whether the Supreme Court of Virginia's dismissal of Petitioner's appeal for failure to conform to the Court's perfection of appeal requirements violated Petitioner's constitutional rights?

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No. 87-1993

In The

Supreme Court of the United States

October Term, 1988

ANTHONY H. ROBINSON,

Petitioner,

v.

VIRGINIA STATE BAR, *ex rel.*
THIRD DISTRICT COMMITTEE,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

The Respondent, Virginia State Bar, Third District Committee respectfully opposes Anthony H. Robinson's petition to this Court for writ of certiorari to the Supreme Court of Virginia.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent constitutional provision is the Fourteenth Amendment, Section 1 to the Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statutory provision governing this appeal is Va. Code § 54-74(5):

> Appeal – The person or persons making the complaint or the defendant, may, as of right, appeal from the judgment of the court to the Supreme Court, by petition based upon a true transcript of the record, which shall be made up and certified as in actions at law . . .

Also applicable are the following Rules of the Supreme Court of Virginia:

Rule 5:5(a). Extension of Time; Filing by Mail.

> (a) The times prescribed for filing the notice of appeal (Rules 5:9(a), 5:14(a) and 5:21(c)), the transcript or written statement (Rule 5:11), a petition for appeal (Rules 5:17(a) and 5:21(g)) and a petition for rehearing (Rules 5:20 and 5:39), are mandatory. The time period for filing the notice of appeal is not extended by the filing of a motion for a new trial, a petition for rehearing, or a like pleading unless the final judgment is modified, vacated, or suspended by the trial court pursuant to Rule 1:1 or a rehearing is granted by the Court of Appeals. In any such case the time for filing shall be computed from the date of the final judgment entered following such modification, vacation, suspension, or rehearing.

Rule 5:9. Notice of Appeal.

(a) Timeliness. – No appeal shall be allowed unless, within 30 days after entry of final judgment or other appealable order or decree, counsel for the appellant files with the clerk of the trial court a notice of appeal and at the same time mails or delivers a copy of such notice to all opposing counsel.

Rule 5:20. Denial of Appeal; Petition for Rehearing.

When a petition for appeal is denied, the clerk of this Court shall mail a copy of the order denying the appeal to counsel for the appellant and counsel for the appellee. Counsel for the appellant may, within 14 days after the date of this notice, file a petition for rehearing in the office of the clerk of this Court. The petition shall state that a copy has been mailed or delivered to counsel for the appellee. Eight copies shall be filed. Carbon copies are acceptable. Oral argument on the petition for rehearing will not be allowed. No responsive brief shall be filed unless requested by this Court. The clerk of this Court shall notify counsel for the appellant and counsel for the appellee of the action taken by this Court on the petition for rehearing.

Disciplinary Rule 5-105. Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

(A) A lawyer shall decline proferred employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proferred employment, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional

judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

STATEMENT OF THE CASE

Anthony H. Robinson (hereinafter, the "Appellant") challenges the February 19, 1988 decision of the Supreme Court of Virginia to dismiss his appeal of a one year suspension of his license to practice law. The suspension was ordered on October 21, 1987 by a Three Judge Panel, designated by the Chief Justice of the Virginia Supreme Court. A notice of appeal was filed with the trial court clerk on November 25, 1987, which was 5 days later than the deadline imposed by Rule 5:9 of the Rules of the Supreme Court of Virginia. As shown in Appellant's Appendix A, p. 18, the Court dismissed the appeal on the basis of Rule 5:9. On April 13, 1988, the Court denied his request to vacate the dismissal order, see Appellant's Appendix A, p. 29.

Disciplinary proceedings initially began on March 10, 1987, when the Virginia State Bar Third District Committee (the "Committee") held a hearing to investigate certain complaints of ethical misconduct by the Appellant. After hearing the testimony of the complainant, Robinson, and his affected clients, the Committee made the following Certification:

Statement of Misconduct

1. Anthony H. Robinson, the respondent, is an attorney and is presently licensed to practice in Virginia during all times relative to these proceedings.

2. Respondent undertook representation of a driver of an automobile in a personal injury case and also undertook representation of a passenger in the same vehicle who was injured at the time.

3. Respondent entered a nolo contendere plea in the traffic matter for the driver of the vehicle, it being determined that the liability for said accident was lodged with the driver of the automobile.

4. Counsel for the insurance company informed respondent of the apparent conflict of interest in representing both the driver and the passenger of the vehicle wherein the driver of said vehicle was at fault.

5. Respondent refused to acknowledge said conflict and continued representing both parties in the matter.

6. Counsel for the insurance company filed a petition in the General District Court for the City of Richmond, Civil Division, to have respondent removed from the case. Respondent finally acquiesced and withdrew from the matters hereinabove referred.

7. As a result of the foregoing, the Committee finds by clear and convincing evidence that the respondent has violated the following disciplinary rules of the revised Code of Professional Responsibility effective October 1, 1983: DR 5-105(A), (B) and (D).

A Statement of the Charges of Misconduct was sent to the Appellant on June 23, 1987. He made a timely demand that the allegations of misconduct be heard by a Three Judge Panel pursuant to § 54-74 of the Code of Virginia. A Rule to Show Cause why his license to practice law should not be revoked or suspended was issued on August 3, 1987.

The Three Judge Panel had a hearing on September 28, 1987 at the Circuit Court of the City of Richmond. After hearing testimony from the complaining witness, Mr. Christopher C. Spencer, Mr. Robinson's former clients, Ms. Stokes and Ms. Washington, Ms. Stokes' father and Mr. Robinson, the Three Judge Panel adopted the Third District Committee's first six findings of fact and found that Mr. Robinson's conduct constituted misconduct in violation of Disciplinary Rules 5-105(A), 5-105(B) and 5-105(C). The Panel ordered that Mr. Robinson's license to practice law within the Commonwealth of Virginia be suspended for a period of twelve (12) months, effective December 1, 1987. Contrary to Appellant's statement in his Petition, counsel for the Bar made no recommendation as to the length of suspension.

Although the Appellant was ordered to give notice of this suspension to his clients, to make arrangements for the disposition of their business and to give evidence of such compliance to the Bar, no evidence of such compliance has been received to date. The Virginia Supreme Court issued a stay on April 13, 1988 and then further deferred the mandate until July 12, 1988. The legal effect of a stay issued on January 20, 1988 by

one member of the Three Judge Panel remains unsettled. On April 6, 1988 a quo warranto petition was filed in the Circuit Court of the County of Chesterfield contesting the Appellant's right to practice law after March 4, 1988 (fourteen days following the dismissal). Also pending is a Renewed Motion for a Writ of Supersedeas in the Supreme Court of Virginia, which seeks a retroactive stay of the October 21, 1987 order.

REASONS FOR DENYING THE WRIT

I. DISMISSAL OF PETITIONER'S APPEAL IS NOT VIOLATIVE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

This petition seeks review of the decision of the Supreme Court of Virginia to dismiss Appellant's Petition for Appeal on the ground that it was not perfected according to the applicable state statute and court rules. Appellee (hereinafter "the Bar") recognizes that those aggrieved by Virginia State Bar disciplinary proceedings "*may*, of right, appeal from the judgment of the Court to the Supreme Court." Code of Virginia, § 54-74(5) (emphasis added). The Bar, however, disagrees that a right to appeal in any way absolves the Appellant from failing to adhere to the mandatory filing requirements and timetable specified in the Rules of the Supreme Court of Virginia. Further, the Bar argues that the dismissal did not abridge Appellant's constitutional rights, as guaranteed by the Fourteenth Amendment to the Constitution of the United States. Therefore, there was no reason for the Court to waive its perfection of appeal requirements.

A right to appeal does not dispense with the Court's rules regarding filing requirements and time deadlines; nor does it require the Virginia Supreme Court automatically to hear all lawyer disciplinary cases. Section 54-74(5) of the Code of Virginia requires that an appeal from a Three Judge Panel is to be perfected as an action at law. Rule 5:9 requires that the Appellant file a notice of appeal with the clerk of the trial court within 30 days after the entry of final judgment or "no appeal shall be allowed." The rule is mandatory. Adherence to these requirements is to be complied with strictly. *Mears v. Mears*, 206 Va. 444, 445, 143 S.E.2d 889, 890 (1965); *Tharp v. Commonwealth*, 211 Va. 1, 175 S.E.2d 277 (1970); *Vaughan v. Vaughan*, 215 Va. 328, 210 S.E.2d 140 (1979).

The record clearly reflects that Appellant failed to note his appeal with the Circuit Court Clerk within 30 days of final judgment as required by Va. Code § 54-74(5) and Rule 5:9. Although Appellant sent a letter of intention to appeal to the Virginia State Bar on the 30th day, this did not constitute a notice of appeal. It was only after counsel for the Bar directed his counsel to § 54-74 of the Code that the late notice was sent to the Clerk. This notice was sent 35 days after final judgment and thus, was not in compliance with Rule 5:9.[1]

---

[1] In dismissing this appeal, the Court expressly rested its decision on Rule 5:9. Appellant states that the Court "allegedly" (Petition for Writ of Certiorari at pp. 6, 10), based its decision on Rule 5:9, thereby implying that other reasons motivated the Court. Such unsupported statements of "bad faith" are counterproductive at best and obviously disrespectful to the Court.

As announced in *Tharp, supra*, 211 Va. at 3, the Virginia Supreme Court will extend filing deadlines if a denial or dismissal would, in effect, abridge a constitutional right. In *O'Brien v. Socony Mobil Oil*, 207 Va. 707, 152 S.E.2d 278, cert. denied, 389 U.S. 825 (1967), the Supreme Court of Virginia declined to waive the mandatory requirements of the Rules of Court regarding perfection of appeal, finding that there was no precedent for waiver since the appellant had not been denied her constitutional rights. In justifying its decision, the Court explained that prior waivers had been granted to habeas corpus petitioners who, in light of certain United States Supreme Court mandates, had been denied constitutional rights. This appeal, likewise, fails to assert a valid constitutional abridgment which would necessitate a waiver. Also see *Hirschop v. Commonwealth*, 209 Va. 678, 166 S.E.2d 322, cert. denied, 396 U.S. 845 (1969), another case in which this Court let stand the decision of the Supreme Court of Virginia to deny an attorney's writ of error because he failed to perfect the appeal of his criminal contempt conviction in a timely fashion.

Appellant raises, in very general terms, an infringement of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. His authority is *Hutto v. Waters*, 552 F.Supp. 266, 269 (E.D. Va. 1982), an employment dispute alleging a deprivation of procedural due process. Appellant, however, does not maintain that he has been a victim of arbitrary and irrational classification or invidious discrimination stemming from prejudice or hostility; nor does he dispute the rational basis of the state's lawyer

disciplinary procedures. *See Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957).

Assuming Appellant is asserting a due process violation, the case law is clear that a right to appeal does not guarantee an appeal to a litigant who fails to meet filing deadlines. In *Meade v. Cox*, 310 F.Supp 233 (W.D. Va. 1970), aff'd, 438 F.2d 323 (4th Cir.), cert. denied, 404 U.S. 910 (1971), the District Court specifically held that due process of law does not require that the Virginia Supreme Court automatically hear an appeal on all denials of habeas corpus petitions. In dismissing the case based on the petitioner's failure to file a notice of appeal, the Court stated: "Petitioners in habeas corpus must follow the rules of Court as must all other parties who wish to appeal." *Meade*, 310 F.Supp at 239. Also see *Williams v. Landon*, 1 Va. App. 206, 336 S.E.2d 907 (1985), in which the Virginia Court of Appeals cites the holding in *Meade* and dismisses a habeas corpus appeal for appellant's failure to file a timely notice of appeal. In *Turner v. Commonwealth*, 2 Va. App. 96, 341 S.E.2d 400 (1986), the Virginia Court of Appeals again held that the time prescribed for filing a notice of appeal is mandatory. In this case, the Court dismissed a direct appeal (or appeal of right) from the Circuit Court of a forging and uttering criminal conviction.

In summary, Appellant has not been denied the right to a "de novo" review as he claims he is entitled on page 7 of the Petition for Writ of Certiorari. He simply has, by his own tardiness, forfeited his right to seek an "independent examination of the record." *Blue v. Seventh District Committee of the Virginia State Bar*, 220 Va. 1056, 265 S.E.2d 753 (1980).

II. DISMISSAL OF PETITIONER'S APPEAL WAS NOT AN ABUSE OF JUDICIAL DISCRETION

Traditionally, states have been given considerable deference by the United States Supreme Court in the control and supervision of the practice of law. *See Norfolk and Western R. Co. v. Beatty*, 423 U.S. 1009 (1975), summarily aff'g 400 F.Supp. 234 (S.D. Ill.). The Court's reluctance to "sit in judgment" of state court decisions in bar matters also was stated in *Theard v. U.S.*, 354 U.S. 278 (1957). Appellant, however, seeks review on the additional basis that the Virginia Supreme Court has abused its judicial discretion in arbitrarily dismissing this lawyer disciplinary appeal.

Citing *Avery v. County School Board*, 192 Va. 329, 64 S.E. 767 (1951), Appellant advances the argument that the Court "punished" him by applying Rule 5:9 arbitrarily. Upon close examination, the *Avery* case discloses the Court's rationale for imposing filing deadlines. That case presented a situation in which the appellant had failed to designate, within the time provided for in the Rules of Court, the parts of the record they desired printed. In dismissing the appeal, the Court found that the rule was not simply directory, but mandatory. The Court described the step as an essential feature of taking an appeal and reasoned as follows:

> . . . the orderly administration of justice requires that certain rules must be obeyed, however technical they may seem to be. This is particularly true of time limits . . . If there is to be any time limit, it must be specified; and if there were no time limit,

> the appellee would never know when his case was ended.

Avery v. County School Board, supra, 192 Va. at 331. Strikingly similar is this Court's reasoning in *Browder v. Director, Ill. Dept. of Corrections*, 434 U.S. 257, 264 reh'g denied, 434 U.S. 1089 (1977), which interprets Fed. Rule App. Proc. 4(a) and 28 U.S.C. § 2107:

> . . . a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken. The 30-day time limit is "mandatory and jurisdictional." (citations omitted). The purpose of the rule is clear: It is "to set up a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands. Any other construction of the statute would defeat its purpose." (citations omitted).

In accord is *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982); also see *Cole v. Violette, et al.*, 319 U.S. 581 (1943).

Given the previously cited litany of Supreme Court and Court of Appeals opinions, it is clear that the mandatory Rules of Court regarding perfection of appeals are routinely enforced in Virginia. Absent a showing that the Court casually or randomly waives those requirements, this decision to enforce the Rules of Court is well within the bounds of acceptable judicial discretion. Likewise, it is in conformity with this Court's view regarding mandatory perfection of appeal requirements.

III. THE REFUSAL TO VACATE OR RECONSIDER THE DISMISSAL WAS NOT AN ABUSE OF JUDICIAL DISCRETION

Following the dismissal of this appeal, Appellant then failed to seek a rehearing in a timely fashion. Rule 5:20 of the Rules of the Supreme Court of Virginia specifically requires that a request for rehearing is to be filed within fourteen days after the date of the notice of the order denying the appeal. Appellant's "Motion to Vacate" was filed on March 18, 1988, 26 days after the denial of the appeal. This rule, also, is mandatory as expressly required by Rule 5:5 and the previously cited case authorities. As stated in *Tharp*, *supra*, 211 Va. at 2, the "practice of granting extensions had led to abuse . . . contributed to delay. . . ."

Appellant seeks refuge from accepting responsibility for his failure to seek appellate review by blaming his attorneys. He cites *Reizakis v. Loy*, 490 F.2d 1132, 1135 (4th Cir. 1974) and argues that the Virginia Supreme Court should be reluctant to punish a client for the behavior of his lawyer. Aside from the obvious distinction – Mr. Robinson is not a ill-informed layman as was the client in *Reizakis* – the case at bar is decidedly different. In fact, Appellant's case suffers from the express circumstances outlined in *Reizakis* that necessitate dismissals: "a drawn out history of deliberately proceeding in dilatory fashion." *Reizakis*, 490 F.Supp. at 1135, quoting *Link v. Wabash R.R.*, 370 U.S. 626 (1962).

Appellant also cites *Hartscock v. Powell*, 199 Va. 320, 99 S.E.2d 581 (1957) as an example of a case in

which a "good cause" time extension was granted. That case involved counsel who was a member of the Virginia General Assembly. He was specifically protected by a state statute, which authorized waivers of filing requirements and time extensions for Assembly members involved in litigation during the legislative session.

In summary, Appellant has failed to demonstrate that the Supreme Court of Virginia was arbitrary, abusive, or in any way misapplied judicial discretion in enforcing its rules governing the perfection of appeals.

CONCLUSION

The Supreme Court of Virginia properly dismissed this lawyer disciplinary appeal on the basis of Appellant's failure to file a timely notice of his appeal to the trial court clerk as expressly required by the state statute, the Rules of Court, and well established case precedent. This exercise of judicial discretion did not offend the Appellant's constitutional rights. A waiver of the jurisdictional requirements was not called for in these circumstances. For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

MARY SUE TERRY
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Deputy Attorney General
Counsel of Record

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